Big Blue Taxi Facilities Sdn Bhd v Pusat Pembangunan Reka Bentuk (M) Sdn Bhd

HIGH COURT (KUALA LUMPUR) — CIVIL SUIT NO 22NCVC-694–12 OF 2015
NORDIN HASSAN J
21 FEBRUARY 2018

Contract — Misrepresentation — False representation induced plaintiff to sign agreement — Whether defendant made representation that defendant was owner of land — Whether defendant misrepresented that it had right to rent land to plaintiff — Whether s 116 of the Evidence Act 1950 applicable — Whether damages proven

Tort — Defamation — Slander — Plaintiff claimed defendant defamed plaintiff by alleging plaintiff had failed to pay rent — Whether evidence adduced to prove claim — Whether plaintiff particularised facts and matters of alleged slander by defendant — Rules of Court 2012 O 78 r 3(1)

The plaintiff filed an action against the defendant based on an alleged misrepresentation by the defendant to the plaintiff which induced the plaintiff to enter into an agreement ('the said agreement') to rent a piece of land ('the said land') by signing a letter of undertaking dated 3 November 2010 ('the LOU'). The misrepresentation as pleaded by the plaintiff in its statement of claim was that the defendant owned the said land which in actual fact was owned by the Federal Land Commissioners. The plaintiff also claimed for damages for slander; and losses and expenses incurred. The defendant denied making any misrepresentation to the plaintiff or uttered slanderous words. The defendant filed a counterclaim against the plaintiff for the unpaid rental arising from the said agreement. The plaintiff submitted that the defendant had no right to rent the said land to the plaintiff and misrepresented that it had such right. The plaintiff referred to an approval letter dated 21 January 2008 for the defendant to occupy the said land in which, one of the condition stipulated therein was that the premise was not to be rented out to any third party. The plaintiff had also raise an issue on the application of s 116 of the Evidence Act 1950 ('the Act') in the present case. The plaintiff further argued that: (a) the plaintiff could not apply for the permit from the relevant authorities to operate the taxi hub on the said land due to the defendant's failure to confirm the status of the registered owner of the land and the tenure of the land use; and (b) the defendant had defamed the plaintiff by telling the taxi drivers that the plaintiff did not pay the rental of the land and this news had also spread among the KLCC management personal.

Held, dismissing the plaintiff's case against the defendant and allowing the defendant's counterclaim with costs of RM20,000 to the defendant subject to allocator fee:

(1) Based on the contemporaneous documents and oral evidence by witnesses, it could be deduced that, it was within the knowledge of the plaintiff that the defendant was not the owner of the said piece of land and only the holder of right of use of the land. There was no evidence produced during trial that the defendant had represented to the plaintiff that the defendant was the owner of the land. As such, the plaintiff's contention that the defendant represented itself as owner of the said land was without merit (see para 23).

(2) As the plaintiff was bound by its pleadings and the court was constrained to decide issues which was not pleaded, therefore, the court could disregard the plaintiff's contention on the issue of the defendant's right to rent the said land to the plaintiff. In any event, based on the evidence of the defendant's witness and the documentary evidence adduced during trial, the court found, the defendant had the right to rent the land to the plaintiff at the material time. As such, the issue of misrepresentation by the defendant as to its right to rent was a non-issue and untenable (see paras 26–27 & 31).

(3) The established facts were that, the plaintiff had possession of the said land from 3 November 2010–30 June 2011 and the possession was with the permission of the defendant upon the parties signing the said LOU. As such s 116 of the Act was applicable in the present case. In the present case, the court had ruled that there was no evidence of misrepresentation by the defendant to the plaintiff, as such the plaintiff was estopped from denying the defendant's title during the plaintiff's possession of the land (see paras 39–40).

(4) It was not a term of the agreement for the defendant to provide the information required by the plaintiff or the title of the said land. In addition, it was the term of the LOU that the defendant was not liable if the approval from the authority had not been granted. In the circumstances, the defendant could not be faulted for the plaintiff's failure to obtain the said permit (see para 43).

(5) No evidence was adduced in the court from any taxi driver whom purportedly was informed about the unpaid rental and who from the defendant had informed this fact. Further, in the pleadings, the plaintiff had not particularised the facts and matters of the alleged slander committed by the defendant. This was clearly in breached of O 78 r 3(1) of the Rules of Court 2012 which was fatal to the plaintiff's case. In totality, on the balance of probabilities, the plaintiff had failed to prove its case against the defendant (see paras 46–48 & 50).

(6) There was no such agreement under the LOU for the plaintiff to upgrade the said land and to be reimbursed by the defendant. There was also no evidence to show that the purported upgrading was with the consent of the defendant. Moreover, the amount claimed had not been substantiated by the plaintiff. As for the loss of profits claimed by the plaintiff which included the clamping and towing services, the plaintiff had also failed to prove the same. There was no cogent evidence be it oral or documentary to support this claim (see paras 52–53).

(7) As for the defendant's counterclaim, it was not disputed by the parties that the agreed rental for the land was RM850 daily. It was also an established fact that the plaintiff had occupied the land for its taxi hub on 3 November 2010 and had vacated the premises on 30 June 2011. The defendant also had produced in evidence the invoices and the debit notes in the total amount of RM166,500. Therefore, the defendant had proved its counterclaim against the plaintiff (see paras 55–56).

[Bahasa Malaysia summary

Plaintif memfailkan tindakan tergadap defendan berdasarkan atas salah nyata yang didakwa oleh defendan terhadap plaintif yang membuatkan plaintif memasuki perjanjian ('perjanjian tersebut') untuk menyewa sebidang tanah ('tanah') dengan menandatangani surat aku janji bertarikh 3 November 2010 ('SA'). Salah nyata seperti yang diplidkan oleh plaintif dalam pernyataan tuntutannya adalah bahawa defendan memiliki tanah tersebut yang mana sebenarnya dimiliki oleh Pesuruhjaya Tanah Persekutuan. Plaintif juga menuntut bagi ganti rugi untuk fitnah; dan kerugian dan perbelanjaan yang ditanggung. Defendan menafikan membuat apa-apa salah nyata kepada plaintif atau menyebut perkataan-perkataan bersifat fitnah. Defendan memfailkan tuntutan balas terhadap plaintif bagi sewa yang tidak dibayar berbangkit daripada perjanjian tersebut. Plaintif berhujah bahawa defendan tidak berhak untuk menyewa tanah tersebut kepada plaintif dan telah salah nyata yang ia mempunyai hak sedemikian. Plaintif merujuk kepada surat kelulusan bertarikh 21 Januari 2008 bagi defendan menduduki tanah tersebut di mana, salah satu syarat yang ditetapkan di dalamnya adalah bahawa premis tidak disewakan kepada mana-mana pihak ketiga. Plaintif juga membangkitkan isu atas permohonan s 116 Akta Keterangan 1950 ('Akta') dalam kes ini. Plaintif selanjutnya berhujah bahawa: (a) plaintif tidak dapat memohon bagi permit daripada pihak berkuasa yang relevan untuk menjalankan pusat teksi atas tanah tersebut akibat kegagalan defendan untuk mengesahkan status pemilik berdaftar tanah tersebut dan tempoh penggunaan tanah tersebut; dan (b) defendan telah memfitnah plaintif dengan memberitahu pemandu-pemandu teksi bahawa plaintif tidak membayar sewa tanah tersebut dan berita ini juga telah tersebar dikalangan pengurusan KLCC.

Diputuskan, menolak kes plaintif terhadap defendan dan membenarkan

tuntutan balas defendan dengan kos sebanyak RM20,000 kepada defendan tertakluk kepada fi alukator: A

(1) Berdasarkan atas dokumen semasa dan keterangan lisan oleh saksi-saksi, ia tidak boleh dibuat kesimpulan bahawa, ia adalah dalam pengetahuan plaintif dan bahawa defendan bukan pemilik tanah tersebut dan hanya pemegang hak penggunaan tanah tersebut. Tidak terdapat keterangan dikemukakan semasa perbicaraan bahawa defendan telah menjelaskan kepada plaintif bahawa defendan adalah pemilik tanah tersebut. Dengan itu, hujahan plaintif bahawa defendan menjelaskan dirinya sebagai pemilik tanah tersebut adalah tanpa merit (lihat perenggan 23). B C

(2) Memandangkan plaintif adalah terikat dengan plidingnya dan mahkamah adalah dipaksa untuk memutuskan isu-isu yang tidak diplidkan, oleh itu, mahkamah boleh tidak mempedulikan hujahan plaintif atas isu hak defendan untuk menyewa tanah tersebut kepada plaintif. Walau bagaimanapun, berdasarkan keterangan saksi-saksi defendan dan keterangan dokumentar yang dikemukakan semasa perbicaraan, mahkamah mendapati, defendan mempunyai hak untuk menyewakan tanah kepada plaintif pada masa material. Dengan itu, isu misrepresentasi oleh defendan terhadap haknya untuk menyewakan adalah bukan isu dantidak dapat dipertahankan (lihat perenggan 26–27 & 31). D E

(3) Fakta yang dibuktikan adalah bahawa, plaintif mempunyai hakmilik terhadap tanah tersebut dari 3 November 2010–30 Jun 2011 dan pemilikan adalah dengan kebenaran defendan apabila pihak-pihak menandatangani SA tersebut. Dengan itu s 116 Akta adalah beraplikasi dalam kes ini. Dalam kes ini, mahkamah telah memutuskan bahawa tidak terdapat keterangan misrepresentasi oleh defendan kepada plaintif, oleh itu plaintif diestop daripada menafikan hakmilik defendan semasa pemilikan plaintif terhadap tanah tersebut (lihat perenggan 39–40). F G

(4) Ia bukan terma perjanjian untuk defendan untuk memberikan maklumat yang dikehendaki oleh plaintif atau hakmilik tanah tersebut. Selanjutnya, ia adalah terma SA bahawa defendan tidak bertanggungjawab jika kelulusan daripada pihak berkuasa tidak diberikan. Dalam keadaan, defendan tidak boleh disalahkan bagi kegagalan untuk mendapatkan permit tersebut (lihat perenggan 43). H

(5) Tiada keterangan dikemukakan di dalam mahkamah daripada mana-mana pemandu teksi yang kononnya telah diberitahu mengenai sewa yang tidak dibayar dan siapa daripada defendan telah memberitahu fakta ini. Selanjutnya, dalam pliding, plaintif tidak memperincikan fakta dan perkara-perkara mengenai fitnah didakwa dilakukan oleh defendan. Ini jelas melanggar A 78 k 3(1) Kaedah-Kaedah Mahkamah 2012 yang mana adalah serius kepada kes plaintif. Secara keseluruhan, atas I

imbangan kebarangkalian, plaintif telah gagal untuk membuktikan kesnya terhadap defendan (lihat perenggan 46–48 & 50).

(6) Tidak terdapat perjanjian sedemikian di bawah SA bagi plaintif untuk meningkatkan tanah tersebut dan untuk dibayar balik oleh defendan. Tidak terdapat keterangan untuk menunjukkan bahawa peningkatan yang dimaksudkan adalah dengan izin defendan. Lebih lagi, jumlah yang dituntut tidak disahkan oleh plaintif. Berkaitan kerugian keuntungan yang dituntut oleh plaintif yang termasuk perkhidmatan mengapit dan menunda, plaintif juga gagal untuk membuktikannya. Tidak terdapat keterangan jelas sama ada lisan atau dokumentar untuk menyokong tuntutan ini (lihat perenggan 52–53).

(7) Mengenai tuntutan balas defendan, ia tidak dipertikaikan oleh pihak-pihak bahawa sewa yang dipersetujui bagi tanah tersebut adalah sebanyak RM850 sehari. Ia juga adalah fakta yang dibuktikan bahawa plaintif telah menduduki tanah tersebut untuk pusat teksinya pada 3 November 2010 dan telah mengosongkan premis tersebut pada 30 Jun 2011. Defendan juga telah mengemukakan keterangan invois dan nota debit dalam jumlah keseluruhan sebanyak RM166,500. Defendan oleh itu telah membuktikan tuntutan balasnya terhadap plaintif (lihat perenggan 55–56).]

Notes

For a case on false representation induced plaintiff to sign agreement, see 3(4) *Mallal's Digest* (5th Ed, 2015) para 6035.

For cases on slander, see 12(1) *Mallal's Digest* (5th Ed, 2017 Reissue) paras 927–951.

Cases referred to

Dr Chong Eng Leong v Tan Sri Harris bin Mohd Salleh [2017] 4 MLJ 611; [2017] 10 CLJ 657, CA (refd)

Guan Teik Sdn Bhd v Haji Mohd Noor bin Haji Yakob & Ors [2000] 4 MLJ 433; [2000] 4 CLJ 324, CA (refd)

Hirabai 1955 AIR Nagpur 234 (refd)

Rosman bin Haji Abdul Rashid v Rosmah Begum bte Bahadur Beg [1993] 2 MLJ 196, HC (refd)

Saiman bin Umar v Lembaga Pertubuhan Peladang and another appeal [2015] 6 MLJ 492, FC (refd)

Singma Sawmill Co Sdn Bhd v Asian Holdings (Industrialised Buildings) Sdn Bhd [1980] 1 MLJ 21, FC (refd)

Tan Seng Hin v Editor of 'See Hua Daily News' & Anor [2008] 8 MLJ 73, HC (refd)

Tay Tho Bok & Anor v Segar Oil Palm Estate Sdn Bhd [1996] 3 MLJ 181, HC (refd)

Wee Tiang Yap v Chan Chan Brothers [1986] 1 MLJ 47, FC (refd)

Legislation referred to

Companies Act 1965
Contracts Act 1950
Evidence Act 1950 s 116
Rules of Court 2012 O 78 r 3(1)

Muhammad Zahir (Nadim Gulam Rasul with him) (Muhammad Zahir) for the plaintiff.
R Thakugan (Asha Anandan with him) (Md Tajuddin & Co) for the defendant.

Nordin Hassan J:

INTRODUCTION

[1] The plaintiff commenced this suit against the defendant basically, based on misrepresentation by the defendant to the plaintiff which induced the plaintiff to enter into an agreement to rent a piece of land by signing a letter of undertaking ('LOU') dated 3 November 2010. The plaintiff also claimed damages against the defendant for slander.

[2] The defendant denies making any misrepresentation to the plaintiff or uttered slanderous words and filed its statement of defence and counterclaim against the plaintiff for the unpaid rental arising from the said agreement.

BACKGROUND FACTS

[3] The relevant facts in this case are the following:

(a) the plaintiff is a company incorporated in Malaysia under the Companies Act 1965 and involves in general commercial business;

(b) the defendant is also a company incorporated in Malaysia under the Companies Act 1965 and is a subsidiary of Majlis Amanah Rakyat (MARA);

(c) on 3 November 2010, the Chief Executive Officer of the defendant (DW6) and the Chief Executive Officer of the plaintiff (PW1) had signed a letter of undertaking (LOU) for the plaintiff to rent a part of a piece of land from the defendant on a temporary basis at Lot 300 (Building 24), Section 63, Jalan Kia Peng, Kuala Lumpur.

(d) the salient terms of the said agreement, are reproduced here which are as follows:

(i) cl 2:

> Awana Sutera Travel & Tours (M) Sdn Bhd to lease a part of land at Lot 300 (Building 24) Di Seksyen 63, Jalan Kia Peng, 50450 Kuala

Lumpur *on a temporary basis until further approval from the Authority and the Board of Directors are being obtained to a maximum of thirty (30) days from the date receipt to this Letter of Undertaking*.

(ii) cl 3:

Awana Sutera Travel & Tours (M) Sdn Bhd *shall pay DDEC a sum of RM850.00 (Ringgit Malaysia Eight Hundred and Fifty) only per day being the payment for the daily rental fee inclusive of all utilities charges and all the payments to be paid on a weekly basis* until the said approvals are being obtained in reference to clause 2. *All the payments shall be made in advance on the first working day of the week*.

(iii) cl 4:

Awana Sutera Travel & Tours (M) Sdn Bhd will upkeep and upgrade the land *for the usage of Taxi queuing operations and other related business only such as canteen operations and car wash services only*. It is hereby agreed that no outsiders are allowed to patronize on/at this said area. Awana Sutera Travel & Tours (M) Sdn Bhd has no rights to sublet the said land to any other third party regardless of business operations nature. *However, DDEC would not be held liable if the approval is not granted in reference to clause 2 where, Awana Sutera Travel & Tours (M) Sdn Bhd shall make good of the land and vacate the land within 2 weeks period upon receiving the notification letter from DDEC*.

(e) upon signing the LOU, plaintiff had occupied and used the said land as a taxi hub for plaintiff's taxi operation for Suria KLCC. The plaintiff also claimed that the land was used to park vehicles that were clamped and towed from Suria KLCC area for illegal parking;

(f) however, the plaintiff has failed to pay the rental for the said land to the defendant as agreed by parties under the LOU which is RM850 daily and to be paid on a weekly basis;

(g) the plaintiff thereafter, through a letter from his former solicitors, Messrs Bala Naido & Partners dated 1 December 2010, had requested the defendant to furnish a copy of the title of the said land, confirming the status of the registered owner and the nature of the land use. This is to enable the plaintif to apply from the relevant authorities the necessary permits to operate its taxi hub. In the same letter, it states that the plaintiff will only pay the rental upon the defendant's confirmation with regard to the registered owner of the land, the nature of the land use and an authorisation letter addressed to the relevant authorities for plaintiff to apply for the said permits;

(h) the defendant, in his reply, through a letter dated 2 December 2012 from its former solicitors Messrs Ahmad Fuad Amin & Partners informed the plaintiff the following:

(i) the defendant is the holder of the right of use of the said land which is owned by the Federal Land Commissioner;

(ii) the plaintiff had rented part of the said land from the defendant in accordance with the terms agreed upon in the LOU dated 3 November 2010; and

(iii) the plaintiff has taken possession of the said land;

(i) in the same letter, it is also states that the plaintiff has failed to pay the rental and emphasised that the payment for rental is not subject to the defendant's action to furnish the land title to the plaintiff;

(j) next, vide a letter dated 24 January 2011 from the defendant's former solicitors to the plaintiff's previous solicitor Messrs Bala Naido & Partners, the defendant has terminated the said agreement or LOU as the LOU has lapsed and demanded the plaintiff to vacate the land and deliver the vacant possession to the defendant within 14 days from the date of the said letter;

(k) in response, the plaintiff vide letter dated 28 January 2011 from his previous solicitor has informed the defendant's solicitors among others as follows:

(i) the defendant has misrepresented to the plaintiff that the defendant has the right to let the land to the plaintiff and to provide consent from the registered land owner for plaintiff to operate taxi hub on the said land;

(ii) the defendant has failed to provide a tenancy agreement in respect of the said land within 30 days from the date of the LOU;

(iii) the plaintiff has upgraded the said land based on the LOU in order to operate as a taxi hub;

(iv) the plaintiff is unable to apply for the permit to operate a taxi hub without the consent of the registered land owner; and

(v) the plaintiff will not vacate the said land until the defendant pays a compensation of RM5m to the plaintiff;

(l) subsequently, the plaintiff filed the present suit against the defendant, inter alia, for the following reliefs:

(i) a mandatory injunction that the said land to be transferred to the plaintiff which is to be used as a taxi hub;

(ii) an injunction to prevent the defendant or its agents either MARA or the Ministry of Rural and Regional Development from entering or locking the entrance of the said land until the conclusion of the trial;

(iii) a declaration that the defendant or its agents cheated the plaintiff in believing the defendant owned the said land;

(iv) an order that the defendant pays the plaintiff the sum of RM136,345 as costs incurred by plaintiff to upgrade the said land for purpose of operating the taxi hub;

(v) damages to be assessed by the court for losses incurred by the plaintiff for not be able to continue with its towing services;

(vi) loss of profits in the sum of RM27,175,070;

(vii) damages in the amount of RM50m for defaming the plaintiff by alleging that the plaintiff was unable to pay the rental of the said land;

(viii) exemplary and aggravated damages; and

(ix) costs; and

(m) the defendant in its counterclaim, on the other hand, claimed from the plaintiff the amount of RM166,500 for the outstanding rental charges from 3 November 2010 until vacant possession given to the defendant on 30 June 2011.

THE PLAINTIFF'S SUBMISSION

[4] Counsel for the plaintiff submits among others as follows:

(a) the defendant does not has the right to rent the said land to the plaintiff; and

(b) the defendant was never in possession or ownership of the said land as the ownership belongs to the Federal Land Commissioner.

[5] In the circumstances counsel for the plaintiff contends that defendant has no locus standi to enter into the tenancy agreement with the plaintiff.

[6] It is also the plaintiff's contention that the defendant has misled the plaintiff with regard to the ownership of the land and the right to rent the land as if it belongs to the defendant but in actual fact the registered owner of the land is the Federal Land Commissioner.

[7] The plaintiff further submits that the defendant has committed a fraudulent act by renting the said land to the plaintiff without having the right to the land.

[8] It is also the plaintiff's contention that the plaintiff has the right to challenge the power or authority of the defendant towards the land.

[9] The plaintiff further submits that the plaintiff has suffered loss and damage to its business reputation when the defendant alledged that the plaintiff has failed to pay the rental of the said land.

[10] It is also the plaintiff's submission that the plaintiff had incurred costs to upgrade the said land for the operation of the taxi hub.

THE DEFENDANT'S SUBMISSION

[11] At the outset, counsel for the defendant in his submission submits that the plaintiff has not proven its case against the defendant on the balance of probabilities.

[12] It is further contends that the plaintiff has failed to adduce any evidence that the defendant had misrepresented to the plaintiff that the defendant is the registered owner of the said land.

[13] The defendant also submits that whether the defendant has the right to rent the said land to the plaintiff is not the plaintiff pleaded case. In any event, the defendant contends that the defendant has the right to rent the said land to the plaintiff.

[14] The defendant further submits that the plaintiff has failed to prove that the defendant has defamed the plaintiff.

[15] It is also the defendant's submission that the plaintiff has failed to prove any damages or losses incurred by the plaintiff.

FINDINGS OF THIS COURT

[16] The crux of the plaintiff's case hinges on the alledged misrepresentation by the defendant that induced the plaintiff to enter into an agreement which is the LOU dated 3 November 2010. Consequently, the plaintiff contends that the plaintiff suffered losses when the said agreement was terminated by the defendant.

[17] In this regard, the word misrepresentation is not defined under the Contracts Act 1950, but it is commonly understood that misrepresentation connotes a representation which is untrue.

[18] In *Tay Tho Bok & Anor v Segar Oil Palm Estate Sdn Bhd* [1996] 3 MLJ 181, the judge accepted the following meaning of misrepresentation as mentioned below:

It is the plaintiff's case that the defendant had dishonestly concealed relevant material facts from them and had misled them into believing. Prior to the execution of the said agreement, that the transmission lines and pipelines were not within the said land. Section 18 of the Contracts Act 1950 gives instances of misrepresentation and from my reading, that section is no exhaustive but the words there seem to stress positive conduct. *Since 'misrepresentation' is not clearly defined in the Act, I would think that we can fall back on common law as to its meaning. As to what constitutes misrepresentation is best decribed in Chesire, Fitfoot and Furmston's Law of Contract, Singapore and Malaysian Edition at p 407 where the learned author said*:

> A representation is a statement of fact made by one party to the contract (the representor) to the other (the representee) which, while not forming a term of the contract, is yet one of the reasons that induces the representee to enter into the contract. *A misrepresentation is simply a representation that is untrue. The representor's state of mind and degree of carefulness are not relevant to classifying a representation as a misrepresentation but only determining the type of misrepresentation, if any*.

[19] In the present case, the misrepresentation as pleaded by the plaintiff in its statement of claim, is that the defendant owned the said land which in actual fact was owned by the Federal Land Commissioners. This is stated in para 5 of the statement of claim and for ease of reference is reproduced as follows:

> 5. Plaintif juga menegaskan bahawa *Defendan telah melakukan suatu tindakan penipuan dengan tindakan Defendan pada awalnya untuk menyatakan yang tanah tersebut adalah milikan Defendan tetapi tanah tersebut bukan milikan Defendan*. Plaintif telah hanya mendapat tahu pada 25hb November 2010 yang tanah tersebut tidak di dalam milikan Defendan kerana pemandu teksi Plaintif telah menerima gangguan dari Dewan Bandaraya Kuala Lumpur untuk menggunakan tanah tersebut tanpa kebenaran daripada pihak Dewan Bandaraya Kuala Lumpur dan/atau meletakkan papan tanda untuk menunjukkan bahawa kawasan tersebut digunakan sebagai Hab Pengurusan Operasi Teksi dan Pemandu Teksi. Defendan telah memaklumkan kepada Plaintif bahawa Defendan telah memohon daripada Pesuruhjaya Tanah Persekutuan supaya tanah tersebut diserah milikannya kepada Defendan tetapi belum mendapat keputusan daripada Pesuruhjaya Tanah Persekutuan pada ketika itu.

[20] In connection to this, evidence by witnesses in court and in particular PW4 and DW6, reveals that no such representation was made by the defendant or its agents that the defendant is the owner of the said land.

[21] Contemporenous documents produced in court also does not indicate that the defendant is the owner of the said land. The documents are the following:

(a) the letter of undertaking dated 3 November 2010 signed by both parties which does not mentioned that the defendant is the owner of the land (exh P6);

(b) the letter from the plaintiff's counsel dated 1 December 2010 to the defendant's counsel asking for confirmation as to who is the registered owner of the said land (exh P7);

(c) the letter from the defendant's counsel dated 2 December 2010 to the plaintiff's counsel which states that the defendant is only the holder of the right of use of the land (exh D38);

(d) the letter from counsel for the defendant to the plaintiff's counsel dated 24 January 2011, again reiterated that the defendant is the holder of the right of use of the said land (exh D34); and

(e) the letter from the plaintiff's counsel to the defendant's counsel dated 28 January 2011 which states among others:

> (a) that your client has misrepresented our client by stating that your client has the right to let *and to provide consent from the registered land owner* to operate taxi hub on the said land.
>
> (exh P8).

[22] With regard to contemporaneous documents, it is instructive to made reference to the Court of Appeal case of *Guan Teik Sdn Bhd v Haji Mohd Noor bin Haji Yakob & Ors* [2000] 4 MLJ 433; [2000] 4 CLJ 324 where Norma Yaakub JCA said this:

> *In cases where conflicting evidence are presented before a court, it is the duty of the court not only to weigh such evidence on a balance of probabilities but it is also encumbent upon the court to look at all the surrounding factors and to weigh and evaluate contemporaneous documents that may tend to establish the truth or otherwise of a given fact*.

[23] Reverting to the present case, based on the abovementioned contemporaneous documents and oral evidence by witnesses, it can be deduced that, it is within the knowledge of the plaintiff that the defendant is not the owner of the said piece of land and only the holder of right of use of the land. I also find that there is no evidence produced during trial that the defendant has represented to the plaintiff that the defendant is the owner of the land. As such, the plaintiff contention that the defendant represented itself as owner of the said land is without merit.

[24] The plaintiff in his submission also argued that the defendant has no right to rent the said land to the plaintiff and misrepresented that it has such right.

[25] Firstly, this is not the plaintiff's pleaded case as in its pleadings it only states that the defendant misrepresented to the plaintiff on ownership of the

land as alluded to earlier. Here, it is trite law that parties are bound by its pleadings. Suffice for me to quote the reminder by the Federal Court in the case of *Saiman bin Umar v Lembaga Pertubuhan Peladang and another appeal* [2015] 6 MLJ 492 which is as follows:

> [41] *We should remind ourselves that parties to an action are bound by their own pleadings. It is therefore necessary to make the point that the court is also bound by the pleadings in as much as the parties themselves.* The most important purpose of pleadings is to plead reasonable cause of action, define the issues of fact and questions of law to be determined by the court. It is a valid argument to make that the court is constrained to decide an action on which no issue has been raised by the parties in their respective pleadings (see *Ambank (M) Bhd v Luqman Kamil bin Mohd Don* [2012] 3 MLJ 1; [2012] 3 MLRA 459 and *Victory Avenue Mfg (M) Sdn Bhd v Matsushita Electronic Devices (M) Sdn Bhd* [2009] 5 MLJ 243).

[26] In this case, as the plaintiff is bound by its pleadings and the court is constrained to decide issues which is not pleaded, therefore, this court can disregard the plaintiff's contention on the issue of the defendant's right to rent the said land to the plaintiff.

[27] In any event, based on the evidence of DW6 and the documentary evidence adduced during trial, I find, the defendant has the right to rent the land to the plaintiff at the material time.

[28] In a letter from 'Jabatan Ketua Pengarah Tanah dan Galian' to 'Ketua Setiausaha, Kementerian Pembangunan Usahawan dan Koperasi' dated 17 March 2008 (exh D31), it states as follows:

> 2. Sukacita dimaklumkan bahawa selaras dengan keputusan Mesyuarat Jemaah Menteri yang telah disahkan pada Mesyuarat 28 Mac 2007 berhubung Cadangan Pelaksanaan Penubuhan Sebuah Pusat Reka Bentuk Negara Di Bawah Pengurusan Majlis Amanah Rakyat.
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> 3. Sehubungan dengan itu, Jemaah Menteri bersetuju keseluruhan Lot 300, Geran 17112, Seksyen 63, Bandar Kuala Lumpur seluas 13593 meter persegi adalah di bawah kawalan Kementerian Pembangunan Usahawan dan Koperasi bagi tujuan Pembinaan Pusat Pembangunan Reka Bentul (salinan Pelan adalah dilampirkan). *Oleh itu, Kementerian/Jabatan tuan bolehlah menjalankan segala aktiviti di atas tanah tersebut dan mengawal tanah tersebut daripada sebarang bentuk pencerobohan*.

[29] In another letter dated 13 January 2009 from 'Jabatan Tanah Dan Galian' to the 'Ketua Setiausaha, Kementerian Pembangunan Usahawan dan Koperasi', it says the following:

> 2. Adalah dimaklumkan bahawa premis JKR No. 986 (24) yang terletak di Geran 17112, Let 300 Seksyen 63 Bandar Kuala Lumpur telahpun ditukarguna kepada Kementerian Pembangunan Usahawan Dan Koperasi melalui surat Jabatan ini JKPTG/SPHP/879/12/12-69 bertarikh 7 Mac 2008 (seperti dilampiran).

3. *Sehubungan itu, urusan pengambilalihan permis JKR 986 (24) tidak perlu dilakukan kerana keseluruhan tanah tersebut adalah terletak di bawah kegunaan Kementerian Pembangunan Usahawan Dan Kopeasi dan segala urusan berkenaan perancangan, pembangunan dan pengawalan tanah tersebut adalah terletak di pihak tuan*.

[30] Subsequently, on 13 March 2009, the defendant has entered and occupied the said land which is Lot 300 (Building 24), Seksyen 63, Jalan Kia Peng, Kuala Lumpur.

[31] Having considered the relevant evidence before this court, I am on the view that the defendant has the right to rent the said land to the plaintiff and as such the issue of misrepresentation by the defendant as to its right to rent is a non-issue and untenable.

[32] In a related issue, the plaintiff make reference to a letter dated 21 January 2008 from 'Bahagian Pengurusan Hartanah Jabatan Perdana Menteri' to 'Ketua Setiausaha, Kementerian Pembangunan Usahawan dan Koperasi' (D26). This is the approval letter for the defendant to occupy the premises, JKR No 986, Jalan Kia Peng, Kuala Lumpur as the defendant's head quarters. In this letter, one of the condition stipulated therein is that the premises is not to be rented out to any third party. Therefore, the plaintiff contends that similarly the defendant cannot rent out the said land to the plaintiff.

[33] In regard to this issue, I noted that the said condition in the letter dated 21 January 2008 is in relation to the premises JKR N 986 (22) of Jalan Kia Peng where the defendant's head quarters is situated. However, for the said land in question which is JKR 986(24), Jalan Kia Peng, no such condition was attached to its approval. The letters dated 17 March 2008 and 13 January 2009 mentioned earlier supports this conclusion.

[34] Another pertinent matter in this case is the application of s 116 of the Evidence Act 1950 which reads as follows:

> No tenant of immovable property, or person claiming through the tenant, shall during the continuance of the tenancy be permitted to deny that the landlord of that tenant had at the beginning of the tenancy a title to the immovable property by the licence of the person in possession shall be permitted to deny that that person had a title to such possession at the time when the licence was given.

[35] Basically, this provision estopped a tenant from denying the landlord's title so long as he has not restored possession by surrender to his landlord.

[36] Seah FJ (as he then was) in the Federal Court case, *Wee Tiang Yap v*

Chan Chan Brothers [1986] 1 MLJ 47 explained the application of s 116 in the following words:

> The estoppel of a tenant is founded upon the contract between him and his landlord. The estoppel applies to a tenant holding over after a notice to quit. *A tenant who had been let into possession cannot deny his landlord's title however defective it may be, so long as he has not openly restored possession by surrender to his landlord*. In *B Kunwat v D Ranjit Singh Sir George Farwell* said at p 98:
>
> > The other point in the case is one of estoppels. The property was let by the plaintiff to defendant Ranjit Singh; he was let into possession by the plaintiff's gardener Bhairon, on her behalf and by her direction, and he regularly paid rent to her and applies to her do all the necessary repairs; he has never given up possession to her although he duly received notice to quit, and he has denied he title. Section 116 of the Indian Evidence Act is perfectly clear on the point, and rests on the principle well established by many English cases, *that a tenant who has been let into possession cannot deny his landlord's title, however defective it may be, so long as he has not openly restored possession by surrender to his landlord*.

[37] In the case of *Singma Sawmill Co Sdn Bhd v Asian Holdings (Industrialised Buildings) Sdn Bhd* [1980] 1 MLJ 21, in regards the provision of s 116, Raja Azlan Shah (as His Majesty then was) said this:

> *Now s 116 of the Evidence Act enacts that no tenant of immovable property shall, during the continuance of the tenance be permitted to deny that the landlord of such tenant had, at the beginning of the tenancy, a title to such immovable property.* The words 'during the continuance of the tenancy' are important and make it clear that where there is no legal tenancy, the provisions of the section are not applicable. That being so, where the contract of tenancy has come to an end by effluxion of time, there is no legal contract of tenancy and therefore there can be no question of the continuance of such tenancy. The tenant in consequence can later challenge the status of the landlord, and he cannot be deemed to be stopped from denying that the title of the landlord has come to an end. We are of the view that the decision in *Ban Seng v Yap Pek Soo* [1967] 2 MLJ 156 is now no longer good law.

[38] This provision of s 116 of the Evidence Act 1950 is applicable when two conditions has been fulfilled which are the possession by the tenant of the premises and the permission for the said possession.

In *Rosman bin Haji Abdul Rashid v Rosmah Begum bte Bahadur Beg* [1993] 2 MLJ 196, the judge, quoting the case of *Hirabai* 1955 AIR Nagpur 234, said as follows:

> Section 116 Evidence Act 1950 reads thus:
>
> > No tenant of immovable property ... shall during the continuance of the tenancy be permitted to deny that the landlord ... had at the beginning of the tenancy a title to the immovable property; ...

In *Hirabai*, the question posed for decision was whether a tenant could deny the title of his landlord after the termination of the tenancy. The court in delivering its judgment quoted with approval the following passage by Mooker J in *Bhaiganti Bewa v Himmat*:

> *Enjoyment by permission is the foundation of the rule that a tenant shall not be permitted to dispute the title of his landlord. Two conditions then are essential to the existence of the estoppels, first, possession, secondly permission; and when these conditions are present, the estoppels arises, and the estoppels prevails so long as such possession continues*.

[39] In the present case, the established facts are, the plaintiff had possession of the said land from 3 November 2010–30 June 2011 and the possession was with the permission of the defendant upon the parties signing the said letter of undertaking dated 3 November 2010. As such s 116 of the Evidence Act 1950 is applicable in this case.

[40] This court has also ruled that there is no evidence of misrepresentation by the defendant to the plaintiff in this case and as such the plaintiff is estopped from denying the defendant's title during the plaintiff's possession of the land.

[41] The plaintiff has also raised an issue that the plaintiff could not apply for the permit from relevant authorities to operate the taxi hub at the said land due to the defendant's failure to confirm the status of the registered owner of the land and the nature of the land use. The defendant was then said has failed to obtain the consent from the registered owner.

[42] In regards to this issue, the agreement by parties as stipulated in the LOU among others spelt out the following terms:

(i) the *tenancy is on a temporary basis* until the approval from the authority and Board of Directors are obtained to a maximum of 30 days from the date of the LOU.

(ii) the rental is on a daily basis of RM850.00 and to be paid on a weekly basis.

(iii) the Defendant would not be held liable if the approval from the authority and Board of Directors is not granted.

(iv) the Plaintiff shall vacate the premises within 2 weeks upon receiving notification letter from the Defendant.

[43] Here, it is not a term of the agreement for the defendant to provide the said information required by the plaintiff or the title of the said land. In any event, if the plaintiff wishes to have the information on the status of the land, it can easily be obtained by conducting a search with the relevant land office which is normally done in any land transaction or dealings. Besides, it is the

term of the LOU that the defendant is not liable if the approval from the authority has not been granted.

In the circumstances, the defendant could not be faulted for the plaintiff's failure to obtain the said permit.

[44] The plaintiff also claimed that the defendant has defamed the plaintiff by alledging that the plaintiff has failed to pay the rental for the said land.

[45] PW1 in his testimony said that the defendant has told taxi drivers that the plaintiff did not pay the rental of the land and this news has also spread among the KLCC management personal.

[46] However, no evidence was adduced in court from any taxi driver whom purportedly was informed about the unpaid rental and who from the defendant has informed this fact.

[47] Apart from this, in the pleadings, the plaintiff has not particularised the facts and matters of the alledged slander committed by the defendant. This clearly in breached of O 78 r 3(1) of the Rules of Court 2012 which reads:

> (1) Where in an action for libel or slander the plaintiff alleges that the words or matters complained of were used in a defamatory sense other than their ordinary meaning, *he must give particulars of the facts and matters on which he relies in respect of such sense*.

[48] The non-compliance of this O 78 r 3(1) is fatal to the plaintiff's case. In *Tan Seng Hin v Editor of 'See Hua Daily News' & Anor* [2008] 8 MLJ 73, the judge had this to say:

> ... In this case, the pleadings failed to satisfy the procedural rules which is to be complied with in respect of defamation suit and in respect of endorsement which was referred to earlier and the other was failure to identify intelligibly by way of pleadings and prove according to law the facts which need to be established within the concept and regime of innuendo *which is seen to be a mandatory requirement under O 78 r 3 of the RHC 1980* (see *Allsop v Church of England Newspaper Ltd* [1972] 2 QB 161; *Tolley v JS Fry & Sons Ltd* [1931] AC 333).

[49] Moreover, PW1 himself admitted that the plaintiff has not paid the rental of the said land. Therefore even if it is true that the defendant did informed taxi drivers that the plaintiff did not pay the rental for the said land, it is the truth. As such, the defence of justification is applicable. In the Court of Appeal case of *Dr Chong Eng Leong v Tan Sri Harris bin Mohd Salleh* [2017] 4 MLJ 611; [2017] 10 CLJ 657, the defence of justification has been explained in the following words:

[40] Justification as a defence affords a complete exoneration from any liability for the defendant, although as a matter of fact and of law, the impugned statement was indeed defamatory. *Justification connotes the truth of the statement.* The rationale upon which this defence is founded is really simple, namely the truth. Stating the truth can never be a wrong in law, though often a time, it may cause hurt to the plaintiff. Nothing can compromise a truth. A truth, however hurtful, once established, cannot be rebutted. Just like antidote is to venom, truth neutralises falsehoods. For that reason, if a defendant were to publish for the whole world to hear, that the plaintiff is a rogue or a scoundrel, the truth of the same statement, once proven by the defendant, would provide a complete and full defence against any liability for defamation. In *Chiew Foo Hua v The Publisher Miri Daily News & Anor* [2000] MLJU 664; [2000] 8 CLJ 68, the court there had held as follows:

> *In order to succeed in the defence of justification, the defendants must establish the truth of all the material statements in the words complained of which may include defamatory comments made therein*. In order to justify such comments, it is necessary to show that the comments are the correct imputations or conclusions to be drawn from the proved facts.

[50] Having considered the available evidence adduced by both parties, I find, on the balance of probabilities, the plaintiff has failed to prove its case against the defendant.

[51] The plaintiff in this case has also claimed for losses and expenses incurred which are as follows:

(a) expenses to upgrade the said land for the operation of the taxi hub in the amount of RM136,345; and

(b) loss of profit in the amount of RM27,175,070.

[52] Here, there is no such agreement under the LOU dated 3 November 2010 for plaintiff to upgrade the said land and to be reimbursed by the defendant. This is consistent with the fact that the tenancy agreement is only on a temporary basis. There is also no evidence to show that the purported upgrading is with the consent of the defendant. Apart from that, the amount claimed has not been substantiated by the plaintiff as the invoices produced are still marked as 'ID' as the maker were not called to prove its contents.

[53] Likewise the loss of profits claimed by the plaintiff which includes the clamping and towing services. I find, the plaintiff has also failed to prove the loss of profits as claimed. There is no cogent evidence be it oral or documentary to support this claim.

[54] In the circumstances the plaintiff case against the defendant is dismissed.

[55] Next, as to the defendants counterclaim, it is not disputed by parties that the agreed rental for the land is RM850 daily. It is also an established facts that the plaintiff had occupied the land for it taxi hub on 3 November 2010 and had vacated the premises on 30 June 2011. The defendant also has produced in evidence the invoices and debit notes in the total amount of RM166,500.

[56] Therefore, I find the defendant has proved its counterclaim against the plaintiff. In the circumstances, the defendant counterclaim for the unpaid rental charges in the amount of RM166,500 is allowed.

[57] The plaintiff is also ordered to pay the total costs of RM20,000 to the defendant and costs is subject to payment of allocator fee.

Plaintiff's case against defendant dismissed; defendant's counterclaim allowed with costs of RM20,000 to defendant subject to allocator fee.

Reported by Dzulqarnain Ab Fatar